BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: BRIAN B., Claimant, and NORTH LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH Case No. 2010100538

DECISION

This matter was heard by Mark Harman, Administrative Law Judge (ALJ), Office of Administrative Hearings, in Van Nuys, California, on August 25, 26, and November 14, 2011. Stella Dorian, Fair Hearing Representative, represented North Los Angeles County Regional Center (Service Agency or NLACRC). Valerie Vanaman and Eric S. Sams, Attorneys at Law, represented Brian B. (Claimant).

Oral and documentary evidence was received at the hearing.[1] The record was held open for written closing arguments, which were timely filed. Claimant's Closing Brief and Reply Brief were marked for identification as CL-25 and CL-26. The Service Agency's Closing Argument was marked as SA-55. The matter was submitted for decision on December 30, 2011.

ISSUE

Is Claimant eligible for the Service Agency's services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code[2] section 4500 et seq. (Lanterman Act)?

[1] Both parties used numbers to designate their exhibits. The ALJ has remarked these exhibits. These exhibits will be identified herein with "SA" for the Service Agency's exhibits, and "CL" for Claimant's (e.g., CL-8; SA-10).

[2] All further statutory references are to the Welfare and Institutions Code.

FINDINGS OF FACT

1. Claimant is a 30-year-old man born on November 27, 1981. He was diagnosed with a seizure disorder at birth. Currently, his seizures are controlled with medication. He was seizure-free for nearly a decade until 2000 when his medications were discontinued. He began again taking Depakote, and will need to continue with this medication indefinitely. Lisa G., his mother (Mother), reported that Claimant often suffers from "absence attacks" or staring spells, despite taking medication, and she saw an increase in the number and severity of these episodes in April or May 2011, but her report was not confirmed by clinical observation or testing.

2. Claimant resides in an apartment with one of his three younger brothers. He does not independently perform self care activities and appears unable to live on his own. He receives supplemental social security income; otherwise, his family provides all his support. He needs others to remind him to take care of his hygiene, such as taking a shower, or to take his medications, which is problematic because he needs medication to control seizure activity. He does not prepare meals. Mother has hired a housekeeper to cook, clean, and do laundry for him.

3. Claimant cannot do things necessary to retain a job. What some have described as "indifferent" behavior about working has been a significant barrier. He needs reminders to go to appointments. He speaks in a soft, low-pitched voice and has mild articulation problems. Although he can answer questions, he does not volunteer information on his own and may not answer at all. He lacks motivation, suffers from depression and anger, is often discouraged and frustrated, and tends to isolate himself. He sees his younger brothers accomplishing things that he can not, and he feels inferior. He sits in his apartment all day on the computer or watches television. He does not drive a vehicle, relying on his family for most transportation needs.

4. In 2010, the California Department of Rehabilitation (DOR) advised the Service Agency that its rehabilitation counselors had worked with Claimant for over five years and, before that, in 1998-2001 when he was a high school student, but during that time Claimant was unable to attain and secure employment "even with a tremendous amount of additional support and preparation." (SA-38.) In March 2009, the DOR had referred Claimant to Pathpoint, a DOR vendor, which provided Claimant with job development services for nearly a year. Claimant appeared to have significant difficulty understanding what was being asked of him or effectively completing a task. (SA-37.) In March 2010, Claimant's support team decided to discontinue these services and focus on assisting Claimant with applying for Service Agency services. Pathpoint reported that Claimant's chances of obtaining and maintaining a job were slim unless and until he received intense pre-vocational and vocational training, preferably followed by employment in a group placement, for a minimum of one to two years. Pathpoint also reported that Claimant's limitations in independent living and community skills necessitated intense personal assistance to perform activities of daily living.

5. Dorothy Corbett (Corbett), an Intake Service Coordinator with the Service Agency, met with Claimant, Mother, and Marian Gamble from PathPoint, in July 2010. Corbett prepared a social assessment. The Service Agency referred Claimant to Anna Levi, Psy.D. (Levi), who performed a psychological evaluation. The Service Agency reviewed Claimant's

prior assessments, evaluations, and school records, as will be discussed below in more detail. Corbett's report stated that the purpose was to determine eligibility based on a seizure disorder, rule out mental retardation, rule out autism,[3] and possible fifth category. On September 21, 2010, the Service Agency sent a Notice of Proposed Action to Claimant, denying his request for services because "your application does not meet criteria for" services. In an accompanying letter, the Service Agency stated that, "Upon careful consideration of the evaluations conducted and assessment information, the NLACRC's Interdisciplinary Eligibility Committee has determined that you are not eligible for services under the Lanterman Act." (SA-1.) On October 6, 2010, Mother filed a request for a fair hearing, and this matter ensued.

Background

6. Claimant was born at 31 weeks gestation and was hospitalized for 11 weeks. He had asphyxia and moderately severe respiratory distress at birth, was resuscitated, placed on a ventilator, and required high pressure to achieve adequate oxygen. He was treated for severe hyaline membrane disease with antibiotics, and apnea of prematurity with Aminophylline. Because of the persistence of apneic episodes, he was evaluated for seizure disorder and underwent Phenobarbital treatment beginning on the 20th day of life for approximately five days. He was off and on the ventilator, and again placed on the ventilator at approximately 50 days due to recurrent apneic episodes. At nine weeks, he had spontaneously improved a great deal and was neurologically much more active and alert. He came off the ventilator, and was without evidence of seizures or apneic spells for the remainder of the hospital course.

7. Claimant was followed by pediatric neurologist Dr. William F. Kneeland on an outpatient basis. He had a seizure at 19 months while attending a Dodger's game and went to the hospital emergency room. In December 1985, Dr. Kneeland observed that Claimant was doing extremely well and was seizure free, noting that Claimant had been "off Phenobarbital for the last few months. . . . [He] continues to have some delay in both motor and speech skills, but seems cognitively to be quite bright. [¶] . . . [¶] Although he continues to need help academically and with some activities of daily living, I think there is little further for me as a neurologist to do with Brian." (SA-9.)

8. Claimant attended preschool shortly before his third birthday. His school district (Conejo Valley Unified School District) determined that he was eligible for special education based on severe receptive and expressive language delays, and fine motor skills that were approximately one year delayed. He started receiving speech and language therapy on April 8, 1985. That same month, Patricia Lotz (Lotz), a district psychologist, administered the Leiter International Performance Scale (Leiter), which is a nonverbal test of cognitive abilities. Claimant exhibited little spontaneous language, but his scores were in the average range of intellectual ability. He passed all of the items at the two-year level. He had a good attention span and was able to work for the entire period. (SA-7.)

[3] At hearing, Claimant no longer asserted he was eligible on the basis of an autism diagnosis.

9. Lotz noted Claimant's significant delays in expressive language and fine motor skills, which she related to his premature birth. She recommended a special class for preschool children with communicative disorders. The following year, Claimant was evaluated by Tri-Counties Regional Center (TCRC) for eligibility under the Lanterman Act. At that time, Claimant had not been taking medication for six months and continued to be seizure free. He continued to have significant delays in expressive language. TCRC relied on the testing by the district, concluding that Claimant had a language comprehension problem due to limited auditory ability, possibly due to complications at birth coupled with seizure activity. (SA-11.) TCRC further concluded that Claimant had normal cognitive abilities, but he "does have some motoric delays, undoubtedly associated with the premature birth and his neonatal course." (SA-10.) TCRC denied Claimant eligibility, but recommended occupational therapy (OT) and participation in a program for preschool children with communicative disorders.

Claimant's School Achievements and Testing

10. Claimant received special education services from the age of three until he graduated high school. Most of the instruction was provided in a special day class setting. For that entire period, he received speech and language services and adaptive physical education for low muscle tone. He was frequently tested for intellectual ability and academic achievement. In July 1988, at age six years, seven months, Las Virgenes Unified School District (LVUSD) tested Claimant's cognitive functioning using the Wechsler Intelligence Scale for Children - Revised. Claimant scored in the low average range of cognitive functioning (Verbal IQ of 81, Performance IQ of 82, Full Scale IQ of 80). His scores were below average in both verbal and non-verbal functioning; his ability to do math reasoning was within the average rage. Areas of primary deficit within the verbal area were vocabulary knowledge, comprehension (ability to use judgment and reasoning) and short term auditory memory (listening and concentration). "One subtest measuring visual sequential memory and understanding social situations was his weakest non-verbal area." Visual motor development appeared delayed at least one year, and impulsivity was noted. Claimant "is an excellent oral reader performing at the beginning second grade level in terms of decoding skills." Math also was an area of strength. "Brian appears shy. He continues to suck his finger when he is tired or finding a situation difficult to cope with. [¶] . . . [¶] He needs to feel secure, and while progress has been seen he needs to develop more speech and language spontaneity in a safe environment. . . . language processing continues to be a disabling factor, as well as the ability to do paper and pencil tasks." (CL-11.)

11. In 1993, Abby S. Yolles, OTR, an occupational therapist, evaluated Claimant at age 11 and noted that he had substantial delays in his fine and gross motor performance, including: deficient muscle tone with poor proximal stability, which interfered with his ability to write; inadequate grasp pattern of pencil; motor planning difficulties (problems coordinating extremities effectively); perceptual-motor problems (problems with design imitation, spatial arrangement of words on paper, ability to copy sentences from book with accuracy); and overall "fine motor coordination problems (lacks good manual dexterity; can't tie shoes; deficient control of scissors; poor coordination when writing);" and inadequate gross motor balance and coordination (poor proximal stability interferes with fine motor skills). (SA-13.)

12. LVUSD retested Claimant in 1992 and 1995. Robert Cunha (Cunha), school psychologist, administered the Wechsler Intelligence Scale for Children – III (WISC-III) in 1992. Claimant's scores indicated a Verbal IQ of 78, Performance IQ of 87, and a Full Scale IQ of 81, which falls in the low average range of cognitive functioning. Cunha administered the WISC-III again in March 1995; Claimant's Full Scale IQ was assessed at 65, which falls in the mental retardation range, a decline of 16 points from the previous administration. In that same month in 1995, Cunha also administered the Woodcock Johnson Psycho-Educational Battery Tests of Achievement – R (WJ-R) to assess academic functioning.

13. On the WJ-R test, Claimant had a standard score of 83 in reading, which falls in the low average range, a score of 102 in math, which falls in the average range, and a score of 78 in written language, which falls in the borderline range of academic learning. Cunha, who administered the WISC-III both in 1992 and 1995, observed some distractibility during the 1995 testing that he did not observe during the 1992 testing. Cunha also questioned the validity of the later WISC-III results because "Brian's classroom performance suggests higher functioning." He said, "[d]ue to Brian's present WISC results differing greatly from 1993 [sic] scores, caution needs to be exercised in lessening the expectation of how much academic challenge Brian can handle. His academic tests show higher functioning than present ability testing would indicate. The reason for a major lessening in Brian's non-verbal thinking skills is unclear." (SA-14.)

14. LVUSD convened an Individualized Education Plan (IEP) meeting on June 6, 1997, as Claimant was finishing the ninth grade. Claimant was receiving speech and language therapy one time per week, for 25 minutes per session and adaptive physical education. The district proposed to evaluate him for OT. The IEP document states that Claimant had delayed vocabulary and perceptual deficits, and low average ability in some areas. The IEP document reported that Claimant was integrated into the regular education setting 34 percent of the school day. It stated that Claimant was slow to respond to oral questions and greetings. The IEP set out goals for Claimant to achieve over the summer, including learning to make his bed, help his mother in the kitchen, and practice making his lunch; in communication skills, Claimant needed to develop functional communication skills and loudness of voice. (SA-18.)

15. On March 10, 1998, when Claimant was 16 years old and in 10th grade, school psychologist Thomas Anderson, Ed.D., administered the WJ-R. Most scores indicated low average to average academic achievement. Claimant's significant weakness, again, was in his writing sample. (SA-20.) His scores, however, were not reflective of an individual with mental retardation. He had a grade equivalent score of 8.5 in calculation. He had a 7.5 grade level in reading vocabulary, a 7.5 grade level in social studies, and an 11.2 grade level in spelling.

16. In a speech and language report prepared in the same month, the speech pathologist wrote that Claimant showed below grade and age level expectations in the acquisition of vocabulary, and remained low average in the processing and recall of spoken information. "He needs more time to process spoken information. His volume can be too soft for the situation. Daily communication skills are adequate for basic needs. His greatest language needs are in the area of interpersonal communication skills." (SA-21.) A multi-

disciplinary psycho-educational report was prepared in May 1998 by Jean Kubelun, Ph.D., who administered the Kaufman Brief Intelligence Test (KBIT) and a test of Visual-Motor Integration (VMI). Dr. Kubelun assigned scores of 89 in vocabulary, 108 in matrices, and a Composite IQ of 89. Dr. Kubelun concluded that Claimant was functioning within the average range of intellectual development. Nonverbal reasoning abilities were developed to a greater extent than his ability to use language to form concepts. Claimant's visual motor integration skills were low average. Dr. Kubelun noted that Claimant was not wearing his prescription lenses.

17. Claimant's counsel has made several assertions that have not been established by the evidence. For example, it is misleading to say that every report of an academic assessment by the school district was in the context of a special education program; the assessments, most likely, represent his academic skills in comparison with all others his age. It was not established that Claimant never completed grade level work consistent with his age. This latter assertion was based on Mother's testimony, but the school records indicate Claimant's academic achievements sometimes met or exceeded grade level work. Claimant's scores on the WJ-R demonstrate Claimant's substantial academic achievements, including average abilities in broad math and low average in reading. In testing administered by Dr. Levi in 2003, *post*, Claimant demonstrated that he could achieve scores in the low to high average range in the verbal domain, with the exception of the vocabulary score. No substantial evidence established that Claimant's teachers ignored or avoided "the fact that Brian's delays were consistent with Mild Mental Retardation." (CL-25, pp. 8-9.)

Claimant's seizure disorder

18. In fall 1996, Claimant was seen by Dr. Andrea Morrison, a pediatric neurologist, who noted that Claimant had had no seizures since the fall of 1991, when he started Depakote. In a subsequent report she stated:

> Brian's intelligence has always been quite clearly normal. His parents, in fact, feel that he is quite bright. It has been difficult to test him adequately. Currently he is said to be reading at or slightly below grade level, but he has problems communicating and processing. Brian often refuses to answer questions and simply withdraws when requests are made of him. Recently he lost his clothes for physical education class and never told his mother that he had done so. He was tested at one point by Jay Borenstein who said that Brian's academic knowledge was there, but hard to demonstrate. [¶] . . . [¶] Brian was also able to learn Hebrew and complete his bar mitzvah. (SA-15.)

Dr. Morrison observed "two major modes here in the office. The first was one of quiet withdrawal with essentially pleasant, passive refusal to answer questions or engage. . . . As he became more comfortable, he became mildly hyperactive and was impulsive, silly, and immature with social behavior that was typical of a much younger child. He had great difficulty in following directions and was clearly easily distracted and impulsive." Dr. Morrison noted that Phenobarbital had made Claimant "very hyperactive, a paradoxical response often seen in children with attention deficit disorder." Dr. Morrison believed that a trial of medication might

help Claimant be more attentive and less easily distracted. "I think he has much more potential than he is currently demonstrating. . . . He is horrified at the notion that he may not be able to go to college. He withdraws from situations in which he may have failure. There is some risk that he will give up because of problems with his self-esteem if he does not begin to succeed better. [¶] . . . [¶] I also think that Brian could use a therapist who is knowledgeable about children with learning disabilities and attention deficit disorder." (SA-15)

19. Dr. Morrison prescribed Adderal. Shortly afterward, it was obvious to Claimant's parents that, without the medication, he was "out of control." The medication appears to have had other positive results. On May 5, 1997, Dr. Morrison wrote: "In special education, he had straight A's on his last report card. His teacher is very pleased with him." (SA-17.) The following year, she wrote: "He just finished the tenth grade and did very well. He had all A's in special education."

Subsequent Intelligence Testing

20. When he was 18 years old and still attending high school, the California Department of Social Services (DSS) referred Claimant to Dr. William Spindell for a psychological evaluation to determine whether he was eligible for supplemental social security income benefits. Dr. Spindell administered the Wechsler Adult Intelligence Scale – IV (WAIS-IV), and obtained a Verbal IQ of 69, a Performance IQ of 65, and a Full Scale IQ of 65. Dr. Spindell noted that Claimant had verbal difficulties, a minimal fund of cultural information, and a modestly developed vocabulary. He wrote: "Memory functions are quite poor. His ability to handle wage times hours problems is nil. His ability to handle small purchase-type problems is nil. His response latencies are extremely long." Dr. Spindell reported that Claimant was able to handle household duties and activities of daily living. He could fix a snack, take care of his personal hygiene, and do a couple of household chores. He reportedly had difficulty with his siblings, especially the one closest in age - 16 - who is now driving and leading a normal life. (CL-7.)

Claimant's Efforts to Become Employed

21. Claimant worked at his father's office for a short time during his junior year in high school. Before graduating in 2000, Claimant became a client of the Transition Partnership Program (TPP)[4] from August 3, 1998, through November 6, 2001. During this time, he worked as a library assistant for Las Virgenes Library from January through June 2000, filing books. He worked as a counselor at Triunfo YMCA during the summer of 2000, helping with recreational activities with first graders. He did not like working at the camp because of the summer heat and being outdoors so much. He enjoyed working with the children. In 2002, Claimant moved to Florida, began living by himself in an independent living program, while

[4] TPP builds partnerships between local education agencies and the DOR to successfully transition high school students with disabilities into meaningful employment or secondary education.

attending a residential computer training program at a technical school for one year. He also attended one semester at Broward County (Florida) Community College, taking computer related courses; however, the classes were too much for him and he quit.

22. He moved back to California. He remained dependent on his parents for financial support and lived with them. He volunteered as an instructor of children at his bowling alley. In June 2003, Claimant and Mother again applied for DOR services to assist him with "independent living and supervised employment, vocation testing and skills." In the application process, Claimant offered as his qualifying condition: developmental delays with communication and speech disorders; seizure disorder; and attention deficit disorder (ADD). Mother reported: "He is unable to concentrate or communicate very well." His stated vocational interests were working in the computer field. The intake counselor's notes indicated that Mother had recently completed an application to NLACRC. The DOR made Claimant eligible based on his being an SSI recipient, and on his seizure disorder and ADD.

Claimant's Request for Services in 2003

23. In 2003, Claimant applied to the Service Agency for a determination of eligibility for services under the Lanterman Act. During the intake interview, Mother reported that Claimant had a history of grand mal seizures, currently controlled by medication, fine motor delays affecting things like writing and tying his shoes, difficulty engaging in reciprocal conversations, and autism. The intake service coordinator noted that Claimant had problems with articulation that effected speech clarity. His eye contact was variable.

24. The Service Agency referred Claimant to Dr. Levi for a psychological evaluation, which was performed on August 18, 2003. Dr. Levi reviewed school records and noted Claimant's history of special education in school. During her observations, she noted Claimant's "apparent difficulty to verbally express his thoughts and poor articulation. Due to pronunciation, his speech is difficult to understand." Dr. Levi administered the Wechsler Adult Intelligence Scale-III (WAIS-III), which demonstrated that Claimant had average intellectual ability. The Full Scale IQ was 90, the Verbal IQ was 88, and the Performance IQ was 94. Claimant achieved an 84 on the Verbal Comprehension Index and 93 on the Perceptual Organization Index. Subtest scores were as follows:

Verbal Domain	Performance Domain
Information 9	Picture Completion 5
Similarities 8	Digit Symbol – Coding 11
Arithmetic 9	Picture Arrangement 8
Vocabulary 4	Block Design 9
Comprehension 6	Matrix Reasoning 13
Digit Span 12	

Dr. Levi also administered the Wide Range Achievement Test-III, and obtained scores in reading of 83, in spelling of 87, and in arithmetic of 83. The Adaptive Behavior Assessment

System – Parent Form (ABAS) was filled out by Mother. Claimant's scores on the ABAS showed adaptive functioning overall in the mild deficit range. Claimant's self care skills, community use, home living, health and safety, and leisure skills were in the borderline range, and his self-direction was below average. Communication skills, as measured by the ABAS, were in the below average range. Dr. Levi found that Claimant did not meet diagnostic criteria for autism. Dr. Levi found that, although his overall adaptive skills were in the mild deficit range, his overall intellectual abilities were average, his reading and arithmetic skills were low average, and his spelling was in the high end of the borderline range. "Thus, Brian does not appear to be mentally retarded." Dr. Levi offered the following diagnoses under the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR):

Axis I: 315.39 Phonological Disorder
Axis II: v71.09 No diagnosis on Axis II
Axis III: Deferred to medical evaluation/summary

25. Carlo De Antonio M.D., FAAP, is a medical consultant for the Service Agency. He reviewed Claimant's medical records and other documents. In his report, he found: "Multiple neurological evaluations do not suggest the presence of substantially handicapping cerebral palsy. Brian's seizures are well controlled with medication and do not appear to represent a substantially handicapping condition at this time." (SA-33.) On October 15, 2003, the Service Agency notified Claimant in writing that it had completed the evaluation process and had determined, based on the reports, that Claimant was not mentally retarded, did not have autism, and did not have a substantially handicapping condition of epilepsy or cerebral palsy. It also concluded that Claimant did not have a handicapping condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals; and, therefore, it deemed Claimant ineligible for regional center services. (CL-34.)

Claimant's Request for Services in 2010

26. Robin Sullivan, M.A., Q.R.P., has been a DOR rehabilitation counselor for 10 years. She has worked with persons, including children, with all kinds of disabilities, e.g., psychiatric illnesses, physical limitations, learning disabilities, or addictions. About 10 percent of her clients are also regional center consumers, i.e., persons with developmental disabilities. She met Claimant in 2006 and has had six or more meetings with him since. She described Claimant as presenting with characteristics that are similar to a person with a developmental disability. She believes that he meets criteria under the fifth category of eligibility. She does not think he presents with symptomatology that is solely psychiatric.

27. Claimant was receiving services from PathPoint, a DOR vendor, in 2009 and 2010, with a goal of helping him to prepare for independent living and employment. He worked with two different job developers, who reported that they had to make appointments with Claimant through Mother because Claimant would not answer the telephone or return calls when messages were left. His job coaches had to repeat things or break things down into steps; otherwise he did not process the information. His memory and sequencing significantly limited his performance. He showed up at job interviews without looking presentable; he did not bring

required documents, establish eye contact, sit up straight, offer a firm handshake, or answer questions that were not related to sports. Although he became frustrated because he could not go further to get a job, and would express a desire to give up, Sullivan does not believe Claimant lacked motivation that was holding him back. She believes for him to succeed, he will need intense pre-vocational day programming, which the DOR does not provide. He will not be able to maintain a job without ongoing job coaching and support.

28. Dr. Levi assessed Claimant again on August 24, 2010. She observed that eye contact was inconsistent, he had a neutral facial expression, and he did not express his feelings. Some people would have a hard to understanding his speech because of his poor articulation. He did not have friends. He tended to distrust other people. It was reported that, in 2005, he lived in a residential placement where he had to share a room, that he was extremely unhappy, that he had aggressive interactions with his roommate, and that he had threatened to kill someone. He was hospitalized and then spent six weeks in a psychiatric day program through Cedars Sinai Medical Center. He was prescribed anti-depressants. Results of testing for autism showed that Claimant was not autistic. Mother completed the ABAS-II, which indicated that Claimant's overall adaptive functioning was in the mild to moderate deficit range (General Adaptive Composite score of 50), with practical skills being the lowest at a score of 47. Dr. Levi administered the WAIS-IV, and obtained a Full Scale IQ of 75, a Verbal Comprehension IQ of 80, a Perceptual Reasoning IQ of 81, a Working Memory Index of 80, and a Processing Speed score of 76. Claimant's highest subtest scores were in information and matrix reasoning, which were in the average range. Dr. Levi wrote that Claimant's "overall intellectual abilities are in the borderline range, however, his abilities varied from average to borderline and overall five individual abilities were in the low average to average range. Thus, Brian does not appear to be mentally retarded." (SA-41.) She offered the following diagnostic impressions:

Axis I: 296.90 Mood Disorder Not Otherwise Specified
Axis II: v71.09 No diagnosis on Axis II
Axis III: Defer to medical review

29. Catherine L. Scarf, Ph.D., the Service Agency's supervising psychologist for psychological services, testified at the hearing for the Service Agency. Dr. Scarf has diagnosed the presence of mental retardation in over 3000 instances. She testified that mental retardation is defined by the DSM-IV-TR as significant sub-average general intellectual functioning, as measured by standardized tests, coupled with adaptive functioning deficits. The condition must originate before an individual attains age 18 years. Dr. Scarf reviewed almost all of the evaluations, assessments, and various reports and documents generated by Claimant's school districts, the psychologists, the DOR, and the Service Agency's consultants. In Dr. Scarf's opinion, based on all of the documentation, Claimant does not have mental retardation. She also believes that he does not meet criteria under the fifth category. Dr. Scarf referenced, in particular, Claimant's consistent performance in the low average range on the WJ-R's tests of broad verbal ability. She said this is not characteristic of a person with mental retardation. She does not believe Dr. Levi improperly administered the intelligence tests in 2003 and 2010, but believes Dr. Levi should have attempted to explain the decrease in IQ score from 90 to 75.

30. Dr. Bruce M. Gale, Ph.D., testified on Claimant's behalf. Dr. Gale has been a licensed psychologist in California since 1988, and has a great deal of experience assessing persons who have or are believed to have a developmental disability. Dr. Gale observed Claimant in various settings, reviewed the panoply of reports and records referenced herein, and interviewed Claimant's brother, Mother, and persons who were working with Claimant through the DOR. He performed some assessments, such as selected subtests of the Woodcock-Johnson III Tests of Cognitive Abilities, Diagnostic Supplement, and Tests of Academic Achievement (Form B), and wrote a lengthy assessment report. Dr. Gale did not perform any standardized testing to assess Claimant's cognitive functioning; he felt that he had already drawn a conclusion from reviewing the data of previous testing: that by evaluating the test methodology previously used and the test data, he could find answers to his questions about whether Claimant had mild or moderate mental retardation. In particular, he did not think he needed to put Claimant through another whole battery, such as administering the WAIS-IV, because "I think evidence was substantial to demonstrate he had mental retardation." Dr. Gale, thus, estimated Claimant's IQ score as 70, based on the entire record. Dr. Gale believes Claimant has Mild Mental Retardation. He also expressed an opinion regarding the possibility that Claimant has Schizoid Personality Disorder.

31. Dr. Gale testified that his analysis was based on comparing Claimant's current and past functioning. He looked at what a normal developmental trajectory (skills development) would be, and then at Claimant's delays. He also cited "risk factors" as something in the record that could denote developmental delay. He thought much of the information in the record was imprecise. For example, data regarding Claimant's milestones was inconsistently reported by Mother. She indicated Claimant rolled over at 7 months, crept at 13 months, and walked at 19 months, spoke his first word at 10.5 months, and spoke his first phrase at two years, chronological age (and not adjusted for prematurity), during a school district developmental health history (SA-8), but data collected during an OT evaluation in 1993 indicated Claimant was rolling over at 10 months, crawling at 15 months, and verbalizing simple words at three years and sentences at four years. (SA-13.) In Corbett's social assessment, Mother said Claimant did not start talking until he was three and one-half. (SA-39.)

32. Dr. Gale also expressed doubts regarding much of the earlier testing, and particularly, the statements in the record that Claimant had normal intelligence, made by those who themselves did not perform any standardized intelligence testing of Claimant, such as Drs. Neeland and Morrison. He criticized the reliability or validity of the Leiter test, conducted when Claimant was age three years, four months, or of the KBIT, conducted when Claimant was 17 years old. Dr. Gale believes that the Leiter cannot be used to diagnose a person, but this statement appears to be misleading. He conceded the record did not delineate Claimant's deficits in adaptive functioning, as no one performed an ABAS or similar standardized measure before age 18. The absence of data demonstrating adaptive functioning deficits concurrent with low IQ test scores before age 18 may pose an issue when diagnosing mental retardation.

33. The IQ scores obtained during Claimant's school years, prior to age 13, were in the low average to average range, well above the threshold for a diagnosis for mental retardation. Dr. Gale predicated his diagnosis on the possibility these scores were "false

positives," either because of practice effect, scoring error, administration error, using the wrong assessment instrument, or the "Flynn effect." Dr. Gale's opinion regarding the Flynn effect and its application in this matter is unsupported by the record. The Flynn effect illustrates the difficulty of comparing test results over time, but it says little about the validity of the test data derived from a particular administration. In sum, Dr. Gale's hypotheses regarding the inaccuracy of the early intelligence testing is unpersuasive. Lastly, Dr. Gale said Dr. Spindell's assessment in 2000 should be considered as very valid, despite the fact that Dr. Spindell's diagnostic impression of "mental retardation, mild to moderate, *resulting from cerebral palsy*" was clearly erroneous. (CL-7.) (Italics added.) Claimant's multiple neurological evaluations do not suggest the presence of substantially handicapping cerebral palsy.

Factual Conclusions

34. The many assessments of Claimant's functioning have established that he does not have a substantial handicap that is the result of mental retardation, a seizure disorder, or a condition as described by the "fifth category." Claimant presents a complex picture, with intelligence test scores that go up and down, and up and down again, and always with scatter. The high scores, however, cannot be disregarded. Dr. Gale, who did not feel a need to perform any standardized testing of Claimant's intellectual functioning, is very close to merely speculating upon the reasons for these variations. On this record, there is no way to know. Claimant has significant functional limitations in many areas of major life activity, including communication skills, self-care, self-direction, capacity for independent living, and economic self-sufficiency, but it is uncertain what is causing this. Claimant's seizure disorder is being controlled by medication, and is not causing these disabilities. Claimant has demonstrated many times that he has greater intellectual ability than his performance on certain tests would indicate, and most likely his true range is much higher than the threshold for mental retardation. Claimant's disabilities are not closely related to mental retardation. Furthermore, Claimant does not require treatment similar to treatment required for individuals with mental retardation.

35 In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that "the fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (*Id.* at p. 1129.) It is therefore helpful to review the factors required for a diagnosis of mental retardation. The DSM-IV provides that the "essential feature of Mental Retardation is significantly subaverage general intellectual functioning…." It must be accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below – approximately two standard deviations below the mean. Claimant has been unable to demonstrate that his general intellectual functioning is significantly sub-average. Some test scores may show borderline intellectual functioning, but others show low average to average cognitive abilities, and the scores on tests of academic achievement were nearly all in the low average to average range.

36. Thus, Claimant does not have this "essential feature" of mental retardation Claimant contends, rather, that he is eligible because deficits in his adaptive functioning suggest either that he has a condition closely related to mental retardation, or that he requires services or treatment similar to that received by individuals with mental retardation. Fifth category eligibility determinations typically begin with a threshold consideration of whether an individual had deficits in intellectual functioning. This is done prior to consideration of other fifth category elements related to similarities between the two conditions, or the treatment needed. Claimant seeks to bypass such threshold consideration of intellectual functioning, and focus instead on his significant limitations in adaptive functioning, and need for services similar to that provided to individuals with mental retardation.

37. The record demonstrated that Claimant is not effectively coping with common life demands and that he does not meet standards of personal independence expected of a young man in his community. His adaptive functioning is substantially impaired. The Service Agency does not dispute this. Rather, it notes that such deficits may have a number of causes, including education, motivation, personality characteristics, social and vocational opportunities, and mental disorders and general medical conditions. Deficits in adaptive behavior may occur in the absence of significant deficits in general cognitive ability. In this case, Claimant has been diagnosed with a mental health disorder. His diagnoses have included Mood Disorder, ADD, Schizoid Personality Disorder, and depression. The evidence failed to demonstrate that the deficits in Claimant's adaptive functioning are related to any cognitive deficits. In this respect, it does not parallel traditional fifth category analysis that looks for subaverage intellectual functioning "accompanied by" significant limitations in adaptive functioning.

38. Fifth category eligibility may also be based upon a condition requiring treatment similar to that required for individuals with mental retardation. Preliminarily, "treatment" and "services" do not mean the same thing. Individuals without developmental disabilities, including those without any diagnosed disabilities, may benefit from many of the services and supports provided to regional center consumers. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as follows:

> "Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.

39. Regional center services and supports targeted at improving or alleviating a developmental disability may be considered "treatment" of developmental disabilities. Thus, section 4512 elaborates further upon the services and supports listed in a consumer's individual program plan as including "diagnoses, evaluation, *treatment*, personal care, day care, domiciliary care, special living arrangements, physical, occupational and speech therapy, training, education, supported and sheltered employment, mental health services,…" (Welf. & Inst. Code, § 4512, subd. (b). Italics supplied.) The designation of "treatment" as a separate

item is clear indication that it is not merely a synonym for services and supports, and this stands to reason given the broader mission of the Lanterman Act: "It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community." (Welf. & Inst. Code, § 4640.7, subd. (a).)

40. The wide range of services and supports listed under section 4512, subdivision (b), are not specific to mental retardation. One would not need to suffer from mental retardation, or any developmental disability, to benefit from the broad array services and supports provided by the Service Agency to individuals with mental retardation. They could be helpful for individuals with other developmental disabilities, or for individuals with mental health disorders, or individuals with no disorders at all. Individuals with mental retardation require treatment that includes one-on-one, focused training that teaches them skills in concrete steps. A mentally retarded person may need to have the tasks broken down into small segments because he or she has a limited ability to comprehend information. Different persons with mental retardation have different abilities, although their eligibility category is the same. Claimant's intellectual abilities allowed him to learn how to read on his own. He received assistance to perform schoolwork, but this may have been the result of his impulsivity and distractibility rather than any deficits in his intellectual ability. Likewise, his arguments that he needs someone to remind him to take his medication, or to instruct him on how to use public transportation, or to provide some kind of supported employment and job training, these are services that do not necessarily mean Claimant needs "treatment" similar to treatment required by an individual who is mentally retarded.

41. The Legislature clearly intended that an individual, to be eligible under the Lanterman Act, would have a condition similar to mental retardation, or would require *treatment* that is specifically required by individuals with mental retardation, and not any other condition, in order to be found eligible. Claimant has argued that he needs supportive living and supported employment services, but the fact he may require assistance in these areas does not mean that he must be found eligible for regional center services under the fifth category. Services such as vocational training are offered to individuals without mental retardation through the DOR. This demonstrates that it is not necessary for an individual to have mental retardation to demonstrate a need for services which may also be helpful for individuals with mental retardation.

42. When considering the needs-based prong of the fifth category, the individual who can establish his needs for particular services must still establish that he has a condition that has many of the same, or close to the same, factors required in classifying a person as mentally retarded. (*Mason v. Office of Administrative Hearings, supra,* 89 Cal.App.4th 1119.) Furthermore, the various additional factors required in designating an individual as developmentally disabled and substantially handicapped must apply as well. (*Id*. at p. 1129.) In short, the broader legislative mandate is to serve individuals with developmental disabilities only. A degree of subjectivity is involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment. This recognizes the difficulty in defining with precision certain developmental disabilities. Thus, the *Mason* court determined:

"it appears that it was the intent of those enacting the Lanterman Act and its implementing regulations not to provide a detailed definition of 'developmental disability' so as to allow greater deference to the [regional center] professionals in determining who should qualify as developmentally disabled and allow some flexibility in determining eligibility so as not to rule out eligibility of individuals with unanticipated conditions, who might need services." (*Id*. at p. 1129.)

43. Although some of the services that Claimant needs to retain and maintain a job are services that typically are afforded those individuals with mental retardation or low global intellectual functioning, this does not mean that these services are "treatments" or that Claimant would need these services in all or almost all areas of learning. The provision of any service or support to an individual with mental retardation would necessarily differ significantly in manner and delivery from that provided to an individual with low average general intelligence. In this respect, individuals with mental retardation would be "treated" differently and thus require different "treatment" than individuals with low average general intelligence.

44. The experience of Dr. Scarf in assessing individuals with developmental disabilities must also be taken into consideration. This is a case where deference should properly be given to Service Agency professionals in determining eligibility. (*Mason v. Office of Administrative Hearings, supra*, 89 Cal.App.4th 1119, 1129.) With the exception of Dr. Gale, Claimant's witnesses were not specialists in the field and did not have the educational or professional experience commensurate with Dr. Scarf. It does appear that Claimant's adaptive behavior deficits arise from his severe mood disorder, and not a developmental disability. Under these circumstances, it cannot be found that he requires treatment similar to that received by individuals with mental retardation.

45. Claimant has the burden in this proceeding to establish his eligibility for services. On this record, it was not established that Claimant is eligible to receive regional center services and supports by reason of a condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. Claimant does not have a condition that is closely related to mental retardation.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is specifically defined as "a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (§ 4512, subd. (a).)

2. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, Claimant must show that he has a "substantial disability," which is defined by regulations to mean "a condition which results in major impairment of cognitive and/or social functioning." (Cal. Code Regs., tit. 17, § 54001, subd. (a).) Because an individual's cognitive and/or social functioning is multifaceted, regulations provide that the existence of a major impairment shall be determined through an assessment that addresses aspects of functioning including, but not limited to: 1) communication skills, 2) learning, 3) self-care, 4) mobility, 5) self-direction, 6) capacity for independent living and 7) economic self-sufficiency. (Cal. Code Regs., tit. 17, § 54001, subd. (b).) In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in the Lanterman Act.

3. In this case, Claimant has failed to establish that he has cerebral palsy or autism. Claimant's cognitive functioning, based on the testing data and the opinions of Drs. Levi and Scarf, is not in the range necessary for a finding that he is mentally retarded. Likewise, Claimant has not established that he has a condition closely related to mental retardation or requiring treatment similar to that required by individuals with mental retardation. Finally, Claimant's seizure disorder is not a cause of his impairments in adaptive functioning. Thus, it was not established that Claimant has a developmental disability that originated before age 18 and that constitutes a substantial disability for him. While Claimant's adaptive functioning appears to be impaired, and he has demonstrated marked impairments in his communication and practical skills, these findings are insufficient to establish the presence of a developmental disability.

4. By reason of the foregoing factual findings and legal conclusions, Claimant did not establish that he has a developmental disability that makes him eligible for services under the Lanterman Act.

ORDER

Claimant's appeal is denied.

DATED: June 8, 2012

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MARK HARMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.